Supreme Court, U.S.
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No. 95-689

In The

Supreme Court of the United States

October Term, 1995

VINCENT FIORETTI,

Petitioner,

vs.

MASSACHUSETTS GENERAL LIFE INSURANCE COMPANY,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should a judicially created implied exception to the clear language of a statute enacted in every state and language that appears in every life insurance policy in the nation be judicially imposed?

2. Should an employee covered by an employment benefit plan, which employee has a life threatening disability, be denied life insurance offered under the benefit plan if he fails to disclose or conceals the existence of the disability?

CERTIFICATE OF INTERESTED PERSONS

Counsel for Petitioner Vincent Fioretti certifies that the following persons and entities have or may have an interest in the outcome of this case.

Vincent Fioretti (petitioner)

Steven Fine (co-counsel for petitioner)

Life Reinsurance Corporation (reinsurer to Massachusetts General)

Mark F. Hughes, Jr. (co-counsel for respondent); a Partner of Robinson, St. John & Wayne

Gerald S. Lesher (co-counsel for petitioner)

The Honorable Stanley Marcus United States District Judge Southern District of Florida (trial judge)

Massachusetts General Life Insurance Company (respondent)

Federico A. Moreno (preliminary district court judge)

John W. Thornton (co-counsel for respondent)

Life Partners Group, Inc.

Independent Processing Services, Inc.

Travel Partners Group Philadelphia

Life Insurance Company and its subsidiary Philadelphia Life Asset Planning Corp.

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No.

In The

Supreme Court of the United States

October Term, 1995

VINCENT FIORETTI,

Petitioner,

vs.

MASSACHUSETTS GENERAL LIFE INSURANCE COMPANY,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Vincent Fioretti respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported in ___ F.2d___ (1995). The opinion of the United States District Court is reported in ___ F. Supp. ___ (1994).

STATEMENT OF JURISDICTION

This is a Petition for a Writ of Certiorari from the United States Court of Appeals for the Eleventh Circuit's denial of a petition for rehearing entered July 24, 1995. The jurisdiction of the Court in invoked under 28 U.S.C. § 1254.

1. The issue involved is of such great importance to a significant portion of the public that it requires a determination by a court of last resort.

2. The issue involved permits a violation of the equal opportunity for Individuals with Disabilities Act, 42 U.S.C. § 12.006 (the "Act").

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Constitution of the United States, Amendment XIV, Section 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction equal protection of laws.

2. Act of July 26, 1990, P.L. 101-336, 104 Stat. 377, 42 U.S.C. § 12112:

a. General Rule:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application, procedures, hiring, advancement, discharge of employee, employee compensation, job training and other terms, conditions, and privileges of employment.

STATEMENT OF THE CASE

Every state in the nation has enacted a statute requiring every life insurance contract in the United States to contain language that the policy shall be incontestible after it has been in force for two years during the lifetime of the insured from the date of issuance except for non-payment of premiums.[1] Some states

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1. Ala. Code § 27-18-4 (1986); Alaska Stat. § 21-48-120 (1988); Ariz. Rev. Stat. Ann. § 20-1260 (1975); Ark. Stat. Ann. § 23-83-111(a)(1987); Cal. Ins. Code § 10206 (West 1989); Colo. Rev. Stat. § 10-7-202 (1987); Del. Code Ann. tit. 18 § 3114 (1989); D.C. Code Ann. § 35-515(2) (1988); Fla. Stat. Ann. § 627.560 (West 1984); Ga. Code Ann. § 56-2704(a)(2) (Harrison 1987); Haw. Rev. Stat. § 431-584 (1985); Idaho Code § 41-2012 (1977); Ill. Ann. Stat. Ch. 73, 843(a) (Smith-Hurd 1965); Ind. Code Ann. § 27-1-12-41(b)(2) (Burns 1986); Iowa Code Ann. § 509.2 (West 1988); Kan. Stat. Ann. § 40-420(2) (1986); Ky. Rev. Stat. Ann. § 304.16-130 (Michie/Bobbs-Merrill 1988); La. Rev. Stat. Ann. § 22.176(2) (West 1959); Me. Rev. Stat. Ann. tit. 24A, § 2615(1); Md. Ann. Code art. 48A, § 428 (1986); Mass. Gen. Laws Ann. Ch. 175, § 134(1) (West 1987); Mich.Comp. Laws Ann. § 500.4432 (West 1983); Minn. Stat. Ann. § 61A.03 sub.1(c) (1986); Mo. Ann. Stat. § 377.320 (Vernon 1968); Mont. Code Ann. § 33-20-1203 (1987); Neb. Rev. Stat. § 44-1607(2) (1988); Nev. Rev. Stat. Ann § 688B.060 (Michie 1986); N.H. Rev. Stat.Ann. § 408.16(II) (1983); N.J. Stat. Ann. § 17B:27-12 (West 1985); N.M. Stat. Ann.

(Cont'd)

allow specific exceptions if the specific exceptions are stated in the policy. Millions of Americans have their lives insured with policies containing this language, and even more Americans rely on these policies to provide financial security for the families protected by these policies issued to individuals or as part of an employment benefit plan. The life insurance policy is one of the bedrocks underlying future financial stability of the American family.

Several state courts and *Erie* bound federal courts at the urging of certain segments of the life insurance industry have instituted a process of creating an implied exception to the clear language of the incontestability clause. The implied exception is incorporated in the opinions of the United States Court of Appeals for the Eleventh Circuit (Appendix B). The implied exception being that a misrepresentation in the application for insurance coverage, even after the two year period, constitutes fraud and justifies rescission. The United States Court of Appeals for the Eleventh Circuit in its opinion in this case even suggests that in the State of New Jersey an innocent misrepresentation after two years would justify such a rescission.

In the case at bar, Anthony Fioretti, under his employee pension plan and knowing that he was HIV positive, a disability, applied for life insurance from Massachusetts General Life

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§ 59A-21-13 (1986); N.Y. Ins. Law § 3220(a)(1) (McKinney 1985); N.C. Gen. Stat. § 58-58-140(2) (1982); N.D. Cent. Code § 26.1-33-11(2) (1989); Ohio Rev. Code Ann. § 3917.06(B) (Anderson 1989); Okla. Stat. Ann. tit. 36, § 4103(2) (West 1976); Or. Rev. Stat. § 743.315 (1989); Pa. Stat. Ann. tit. 40, § 532.6(2) (Purdon 1971); S.C. Code Ann. § 38-65-210(2) (Law. Co-op. 1976 & Supp. 1987); S.D. Codified Laws Ann. § 58-16-35 (1978); Tenn. Code Ann. § 56-7-601(3)(B) (1989); Tex. Ins. Code Ann. § 3.50 sec. 2(2) (Vernon 1981); Utah Code Ann. § 31A-22-510 (1986); Vt. Stat. Ann. tit. 8, § 3814 (1984); Va. Code Ann. § 38.2-3326 (1986); Wash. Rev. Code Ann. § 48.24.120 (1984); W. Va. Code § 33-14-10.

Insurance Company, the Respondent. Anthony Fioretti failed to disclose this fact to the insurance company and caused a blood sample containing substituted blood be submitted for testing. He also failed to disclose information of previous medical examinations. The premiums were paid and the insured died two years after the date of issue. The insured died of AIDS brought on by his being HIV positive.

It was stipulated that the beneficiary of the policy, the Petitioner herein, was not involved in the actions of the insured, nor did he have knowledge of the insured actions. When the policy beneficiary applied for the policy proceeds the insurance company sought rescission.[2]

The insured was HIV positive at the time of his application for insurance. He failed to disclose this disability and hid the disability from the insurer. The judgment and opinion of the Circuit and District Court are based on the fact that had the insurer known that the insured was HIV positive, it would not have issued the policy. A person who is HIV positive has a disability under the Act.[3]

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2. The grounds for rescission, sometimes called the imposter defense, are recognized in Pennsylvania and New Jersey by court deviation from the clear language of the statute. *Ludwinska v. John Hancock Mutual Life Ins. Co.*, 318 Pa. 577, 178 A.2d 28 (1935); *Strawbridge v. New York Life Insurance Co.*, 504 F. Supp. 824 (D. N.J. 1980); *Ledley v. William Penn Life Insurance Co.*, 138 N.J. 627, 651 A.2d 92 (1995) This is a contract defense of misrepresentation in the obtaining of the insurance contract, which the insurance industry argues makes the contract void and subject to rescission. No such defense is available in Florida. *See Bankers Security Life Ins. Society v. Kane*, 885 F.2d 820 (11th Cir. 1989).

3. *Chalk v. United States District Court*, 840 F.2d 701 (9th Cir. 1988); *Baxter v. City of Belleville*, 720 F. Supp. 720 (S.D. Ill. 1989)

REASONS FOR GRANTING THE WRIT

I.

The legal conclusions of this case affect every life insurance policy in the United States and subject each policy at the time of the application for death benefits to be subject to attack on the basis that the insured when making the application knew of information which should have been disclosed, or which constitutes a misrepresentation, *intentional or innocent* in intention, and as such is grounds years later for rescission. This obviously occurs when the insured (now dead) is unavailable to present evidence or explanation of his actions.

The legal conclusions of the courts below make no distinction between the situations where the beneficiary is involved in the misrepresentation or has knowledge of the misrepresentation and those cases, such as the case herein, where the beneficiary is innocent of any action involving the misrepresentation or innocent of knowledge of the misrepresentation. The distinction should be the linchpin of these cases.

The existence of a pre-existing life shortening medical disability can now often be detected at birth through gene analysis or on a routine medical visit to a doctor, who may note the possibility on his charts and not discuss it with the patient who years later applies for insurance, ignorant of the medical condition.

The practical purpose of the incontestability clause in life insurance policies is the expression of the legislative policy of all the states to level the playing field between innocent beneficiaries and cash-rich insurance companies, which have obviously factored the risk of fraud when establishing premiums,

over the actions of a now deceased insured. In *Northwestern Mutual Life Insurance Company v. Johnson,* 254 U.S. 96, 41 S. Ct. 47, 65 L. Ed. 155, Justice Oliver Wendell Holmes wrote about incontestability clauses and opined that said clauses do not contain implied exceptions, but rather express undertakings. What has occurred is that certain lower courts are now permitting the creation of an implied exception contrary to the clear language in a contract and a statute that exists in all 50 states of the union.

The effect of the statutory language creating the incontestability clause and the language itself is to pass the risk of misrepresentation or fraud after two years to the insurance company. This risk which the insurance companies are able to factor into their premium pricing is a risk that they assume for the privilege of being able to write life insurance policies.

In the case at bar, a Florida beneficiary lost policy benefits obtained by his brother, a New York and Florida resident, on a policy found to have been executed in New Jersey because he was subject to a judicially created implied exception to the clear language of an incontestability clause.

The stability of insurance contracts and the uniformity of meaning of the incontestability clause are of paramount importance to our economy. The effect of the Circuit Court opinion renders all of the incontestability statutes a practical nullity because fraud is not a contestable event after the two year period.

II.

A person who becomes HIV positive has a disability. He or she is a member of a class subject to discrimination as a result of a physical condition and thus is protected under the Act. The

Circuit Court and the District Court have stated that the insurance company would not have issued the policy through the insured employee pension plan had it known of this disability. However, the knowledge of the disability would not have permitted the insurance company to deny coverage as said denial would be discriminatory and a violation of the Act.

Therefore, the failure to disclose the disability and even the intentional concealment of the disability should not be grounds for rescission because the right to obtain the benefits of his employee benefit plan, which offered, as its sole benefit, life insurance, is protected by the Act.

CONCLUSION

The importance of the impact on the millions of families relying on life insurance policies currently in existence for their financial security requires this Court to state a judicial policy reaffirming the clear language of the incontestability clause and the statutes which require the placement of the clause in the policy. If the courts wish to create an implied exception to the incontestability cause, *i.e.*, fraud, a distinction should be drawn between innocent beneficiaries and conspiring beneficiaries. What the courts below have permitted is a changing of the legislatively imposed risk after two years from the insurance company to the beneficiary, a trend this Court must not allow.

The congressional findings and purposes of the Act, 42 U.S.C. § 12.101(a) and (b) prohibit the conclusions reached by the Circuit Court, thus the judgment of the Circuit Court should be reversed. This is because the insurance companies and courts' acceptance of the concept that the practice of refusing life insurance to an HIV infected applicant is a violation of the Act.

Respectfully submitted,

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APPENDIX A—DENIAL OF PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED JULY 24, 1995

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-5187

VINCENT FIORETTI,

Plaintiff-Counter-Defendant-
Appellant-Cross-Appellee,

versus

MASSACHUSETTS GENERAL LIFE INSURANCE COMPANY,

Defendant-Counter-Claimant-
Appellee-Cross-Appellant.

On Appeal from the United States District Court for the
Southern District of Florida

ON PETITION(S) FOR REHEARING

Before: KRAVITCH AND EDMONDSON, Circuit Judges, and EISELE*, Senior District Judge.

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* Honorable Garnett Thomas Eisele, Senior U.S. District Judge for the District of Arkansas, sitting by designation.

Appendix A

PER CURIAM:

The petition(s) for rehearing filed by appellant VINCENT FIORETTI is *denied.*

ENTERED FOR THE COURT:

s/ Phyllis Kravitch
UNITED STATES CIRCUIT JUDGE

APPENDIX B — DENIAL OF OPINION OF THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT DATED JUNE 7, 1995

No. 93-5187.

United States Court of Appeals,
Eleventh Circuit.

Vincent FIORETTI,

Plaintiff-Counter-Defendant-
Appellant-Cross-Appellee,

v.

MASSACHUSETTS GENERAL LIFE INSURANCE COMPANY,

Defendant-Counter-Claimant-
Appellee-Cross-Appellant.

June 7, 1995.

* * *

Appeals from the United States District Court for the Southern District of Florida.

Before KRAVITCH and EDMONDSON, Circuit Judges, and EISELE*, Senior District Judge.

EISELE, Senior District Judge:

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* Honorable Garnett Thomas Eisele, Senior U.S. District Judge for the District of Arkansas, sitting by designation.

Appendix B

This is an appeal from a final judgment entered in this diversity action,[1] the subject of which is an insurance coverage dispute. We have jurisdiction pursuant to 28 U.S.C.A. § 1291 (West 1993). Following a bench trial, the district court entered judgment in favor of Massachusetts General Life Insurance Company (MassGen) on all counts of Vincent Fioretti's amended complaint. The court also entered judgment for MassGen on its counterclaims for recision of the disputed life insurance contract. Although we have problems with the legal analysis adopted by the district court, we nevertheless conclude that judgment was, as a matter of law, properly entered in favor of MassGen.[2] As we are permitted to affirm the district court where

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1. Plaintiff Vincent Fioretti is a citizen of Florida. Defendant Massachusetts General Life Insurance Company is a Massachusetts corporation, having its principal place of business in Colorado.

2. Given our conclusion that judgment was properly entered in favor of MassGen, we have no need to decide the primary issue raised by MassGen's cross-appeal, that being whether, in light of the "preemption clause" of the Employee Retirement Income Security Act (ERISA), 29 U.S.C.A. § 1144(a) (West 1985), federal common law should be held to govern this dispute. Nevertheless, we note that MassGen's preemption argument is tenuous at best. Assuming that the disputed insurance policy was provided under an "employee welfare benefit plan," and hence subject to ERISA, see 29 U.S.C.A. § 1002(1) (West 1985), the ERISA "savings clause" expressly provides that, with one exception not presently relevant, the preemption clause "shall [not] be construed to exempt or relieve any person from any law of any State which regulates insurance." 29 U.S.C.A. § 1144(b)(2)(A) (West 1985). The broad language of the savings clause makes it difficult to define the scope of the equally broad preemption clause. See *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739-46, 105 S.Ct. 2380, 2389-92, 85 L.Ed.2d 728 (1985); *Smith v. Jefferson Pilot Life Ins. Co.*, 14 F.3d 562, 569-71 (11th Cir.), *cert. denied*, __ U.S. __, 115 S.Ct. 57, 130 L.Ed.2d 15 (1994). Nevertheless, it seems relatively clear that the central legal issue in this case, namely the effect (if any) of the disputed insurance policy's incontestability clause, involves provisions of state law designed to directly regulate the insurance industry. As such, these questions of

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the judgment entered is correct on any available legal ground, *see Parks v. City of Warner Robins*, 43 F.3d 609, 613 (11th Cir.1995); *SEC v. Southwest Coal & Energy Co.*, 624 F.2d 1312, 1317 (5th Cir.1980),[3] we AFFIRM.

I.

With one crucial exception (which will be discussed later in this opinion), the basic facts underlying this dispute are largely undisputed.[4]

On November 10, 1986, Anthony Fioretti applied for $100,000 of life insurance with the Columbian Mutual Life

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state law fall within the scope of the ERISA savings clause and are not preempted. *See FMC Corp. v. Holliday*, 498 U.S. 52, 58-62, 111 S.Ct. 403, 407-410, 112 L.Ed.2d 356 (1990); *cf. Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47-57, 107 S.Ct. 1549, 1552-1558, 95 L.Ed.2d 39 (1987). Moreover, since the benefits of this ERISA "plan" were not payable from a self-insurance fund, but rather from an insurance policy underwritten by a third-party insurer, it is almost certain that this insurance policy remained subject to state insurance law. *See Metropolitan Life Ins. Co. v. Massachusetts, supra*, 471 U.S. at 741-47, 105 S.Ct. at 2390-93; *cf. Mullenix v. Aetna Life & Casualty Ins. Co.*, 912 F.2d 1406, 1409-13 (11th Cir.1990).

3. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), we adopted as binding precedent all decisions of the prior Fifth Circuit decided prior to October 1, 1981.

4. Our recitation of this dispute's factual background is taken from the district court's written findings of fact. We have independently reviewed the record and are satisfied that the district court's factual findings are supported by substantial credible evidence and are not clearly erroneous. See Fed.R.Civ.P. 52(a), *Pullman-Standard v. Swint*, 456 U.S. 273, 287-88, 102 S.Ct. 1781, 1789-90, 72 L.Ed.2d 66 (1982); *Newell v. Prudential Ins. Co. of Am.*, 904 F.2d 644, 649 (11th Cir.1990).

Insurance Company (Columbian Mutual). This application, which was taken in New York City, indicated that Anthony Fioretti had not, within five years of the application date, experienced any serious medical problems. Nevertheless, he was required to submit to a blood test as a condition of his application. In January, 1987, Columbian Mutual was informed that Anthony Fioretti had tested positive for the Human Immunodeficiency Virus (HIV). Not surprisingly, Columbian Mutual rejected his application. Later in January, 1987, the results of the Columbian blood test were sent, at Anthony Fioretti's request, to Dr. Howard Siegel, a New York physician (and, presumably, one of Anthony Fioretti's treating doctors).

Undaunted by his experience with Columbian Mutual, Anthony Fioretti, on February 10, 1987, applied for $1,947,111 of life insurance with MassGen. However, on his MassGen application Anthony Fioretti represented his name as "C. Tony Fioretti" (his real name was Anthony C. Fioretti) and his date of birth as "3-6-47" (his real date of birth was September 6, 1948). He appears, however, to have correctly listed his Social Security Number as 115-26-0761[5] (the Social Security Number listed on his Columbian Mutual application was "156-42-4187").[6] Additionally, Anthony Fioretti indicated that he had not "within the past 3 years consulted a physician for an examination, blood or other medical tests, [or] treatment of any disease, condition, or other physical disorder." Anthony Fioretti's MassGen

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5. This is also the Social Security Number listed on Anthony Fioretti's death certificate.

6. These misrepresentations are irrelevant for purposes of this appeal. However, it appears that Anthony Fioretti made these misrepresentations in order to make it difficult for MassGen to discover that he had recently been denied life insurance by Columbian Mutual.

application stated that it would be effective as of August 30, 1986, and that the Shields & Warendorff Florist, Inc. Pension Plan would be the owner of this policy.[7] The application stated that Vincent Fioretti (Anthony Fioretti's brother) would be the beneficiary of this policy, and listed Anthony Fioretti's place of residence as both New York City and Tamarac, Florida.

Anthony Fioretti's MassGen application indicated that it was taken by Stuart Kirsner, a broker associated with the New York-based insurance agency Kirsner, Stern & Slavutin, Inc.[8] Although Mr. Kirsner was not licensed to sell insurance in Florida,[9] the application indicated that it was completed in Tamarac, Florida. As a pre-condition for its approval of this application, MassGen required Anthony Fioretti to undergo a blood test for the HIV virus. Anthony Fioretti agreed, but because he knew that he was HIV-positive, in June, 1987 he arranged for an imposter's blood to be tested under his name at the Spring Medical Group in New York City.[10] This test indicated that the

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7. Shields & Warendorff Florist, Inc. was a New York-based corporation (a floral shop) that was then wholly owned by Anthony Fioretti.

8. Actually, this application was completed and signed "Stuart Kirsner" by Suzanne Kaplon-Harmon, a clerk employed in Kirsner, Stern & Slavutin's New York office. Ms. Kaplon-Harmon had the authority to do so.

9. MassGen, by contrast, was authorized to do business in Florida. However, MassGen was not licensed to do business in Mr. Kirsner's home state of New York.

10. During his summation, and again during oral argument, plaintiff's counsel conceded that Anthony Fioretti had arranged for an imposter's blood to be tested in connection with this MassGen application. Given this concession, the district court found it unnecessary to determine whether a third person actually showed up for testing, or whether Anthony Fioretti somehow substituted the third person's blood after presenting himself for testing. We likewise find it unnecessary to answer this question.

blood submitted for testing, namely that of the imposter, had reacted negatively for the HIV virus. Despite this favorable result, MassGen ultimately refused to approve Anthony Fioretti's application, because Mr. Kirsner was not licensed to do business in Florida and the application indicated that it had been completed in that state.

Following this rejection, Anthony Fioretti submitted a second life insurance application to MassGen on September 8, 1987. This application indicated that it was taken by Ina Stern,[11] another broker associated with Kirsner, Stern & Slavutin. The terms of this second MassGen application (*e.g.*, the amount of insurance, the policy's effective date, the beneficiary, etc.) were substantially similar to the original application, as were the misrepresentations concerning Anthony Fioretti's identifying information and medical history. However, in contrast to the former MassGen application, the latter indicated that it was completed in Newark, New Jersey,[12] a state in which Ms. Stern was licensed to sell insurance.[13]

Because this second application was submitted shortly after

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11. As with the prior MassGen application, this application was actually completed and signed "Ina Stern" by Ms. Kaplon-Harmon. Ms. Kaplon-Harmon, had the authority to do so.

12. In addition to this representation, when this application was sent to MassGen's underwriting department it was accompanied by a September 11, 1987 handwritten letter from Ms. Kaplon-Harmon, which stated that "enclosed is the new application signed in N.J."

13. Although MassGen was authorized to do business in New Jersey, it appears that the policy form sold to Anthony Fioretti (a "Lifetrend III" policy) had not then been approved for sale in either New Jersey or New York. This policy form had, by contrast, been approved for sale in Florida.

the results of the above-described blood test were made available, MassGen did not require Anthony Fioretti to undergo a separate HIV test in connection with this application. Instead, after a review by its Colorado office, MassGen advised that it would approve this application, provided that, in lieu of a second HIV test, Anthony Fioretti would be required to execute a Statement of Good Health and Insurability (Statement of Good Health), which he did. This Statement of Good Health, which was executed in New Jersey on September 25, 1987,[14] represented Anthony

14. Vincent Fioretti vigorously argues that the Statement of Good Health (as well as the second MassGen application) was not, in fact, executed in New Jersey (though tellingly, he does not direct us to any evidence suggesting an alternate situs). The district court squarely rejected this claim, finding that "the preponderance of the evidence does not support Plaintiff's contention." Indeed, the district court went even further and expressly concluded that "New Jersey was the location of the last act necessary to complete the contract — as evidenced by the designation of 'NJ' on the Statement of Good Health and the lack of any evidence to contravene this inference." We are satisfied that this factual finding is adequately supported by the record.

Apart from the Statement of Good Health, the only evidence presented to the district court on this factual question was the deposition testimony of Ms. Kaplon-Harmon, the person who actually completed the Statement of Good Health on behalf of Ms. Stern. Unfortunately, this testimony was not probative on this question, as Ms. Kaplon-Harmon testified that she could not remember where this document was signed. However, the Statement of Good Health itself contains a prior statement by Ms. Kaplon-Harmon (the "NJ" notation), *see* Fed.R.Evid. 801(a)(1); *United States v. Day*, 591 F.2d 861, 883 (D.C.Cir. 1978), which indicates that in 1987 she believed that this document was executed in New Jersey. It was plainly within the district court's discretion to conclude that her recollection in 1987 was more accurate than that manifested at her 1990 deposition. And although her prior statement is undoubtably hearsay, Fed.R.Evid. 801(c), *NLRB v. First Termite Control Co.*, 646 F.2d 424, 425-26 (9th Cir.1981), since Ms. Kaplon-Harmon testified that she could not recall where the Statement of Good Health was signed, her prior statement serves as perfectly competent evidence as to the situs of the

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Fioretti was "in good health," that he had "not made an application for insurance which ha[d] been declined, postponed, or modified," and that he had "not consulted or been examined by a physician or practitioner" prior to executing the Statement of Good Health. However, at the time he completed this Statement of Good Health, Anthony Fioretti knew: (1) that he was HIV-positive; (2) that he had previously been declined life insurance by another carrier (Columbian Mutual); and (3) that he had previously consulted with at least two doctors concerning his HIV status. In short, every representation made by Anthony Fioretti in the Statement of Good Health was false.[15]

After completing the Statement of Good Health (and thereby securing insurance coverage), Anthony Fioretti timely paid all of the premiums required under the policy. Shortly thereafter, on December 14, 1987 Anthony Fioretti applied to MassGen for a "Waiver of Premium," which would have relieved him from having to pay any premiums during any period of total disability. Although Anthony Fioretti stated on this application that, "[t]o the best of [his] knowledge and belief," he did not "have any physical disease or disorder," he was nevertheless required to undergo a second HIV test in connection with this application. In April, 1988, he again managed to have an imposter's blood submitted for testing, and once again this blood tested negative

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Statement of Good Health's execution, namely New Jersey. Fed.R.Evid. 803(5); *see White v. Mississippi State Oil & Gas Bd.*, 650 F.2d 540, 543 (5th Cir. Unit A 1981). Moreover, since there is absolutely no evidence in the record to suggest that this document was signed anywhere other than New Jersey, we cannot conclude that the district court's factual finding on this issue is clearly erroneous.

15. Plaintiff's counsel conceded this point at oral argument, stating that Anthony Fioretti had "lied" and provided "false" information to MassGen in order to secure insurance.

for the HIV virus. On the strength of this test result and Anthony Fioretti's execution of a second Statement of Good Health, MassGen approved Anthony Fioretti's Waiver of Premium. This waiver never went into effect, however, because Anthony Fioretti declined to pay the necessary premium.

On February 28, 1989, Anthony Fioretti died while domiciled in Florida. The cause of death listed on his death certificate was Acquired Immune Deficiency Syndrome (AIDS).[16] In April, 1989, Vincent Fioretti filed a claim with MassGen as the beneficiary of the death benefits under Anthony Fioretti's life insurance policy. In December, 1989, MassGen denied Vincent Fioretti's claim and tendered the premiums paid under the policy, but this tender was rejected by Vincent Fioretti's counsel. Later that month, MassGen commenced an action in the Superior Court of New Jersey seeking recision of this policy, but this action was dismissed on June 1, 1990 for lack of personal jurisdiction over Vincent Fioretti. Soon thereafter, Vincent Fioretti commenced an action in the Circuit Court of Florida seeking to recover the death benefits under the policy. On July 5, 1990, MassGen removed this action to the district court and filed its counterclaims seeking recision.

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16. HIV is the retrovirus that is generally believed to cause AIDS. Scientists believe that HIV invades and replicates in the host's cells, most notably the T-lymphocytes (a type of white blood cell that is essential to the proper functioning of the human immune system). The resulting damage to the immune system leaves the infected individual increasingly susceptible to a variety of diseases, such as Kaposi's sarcoma (a skin disease with which Anthony Fioretti was afflicted as early as March, 1987). AIDS is fatal, and there is presently no cure. *See generally* Jay A. Levy, *Human Immunodeficiency Viruses and the Pathogenesis of AIDS*, 261 JAMA 2997 (1989); United States Public Health Service, Surgeon General's Report on Acquired Immune Deficiency Syndrome (1987).

Appendix B

In support of its claims for recession, MassGen argued that since Anthony Fioretti had committed fraud in securing his life insurance policy, *viz*, by misrepresenting his HIV-positive status and by using an imposter's blood to avoid detection, it should be relieved of its obligations under the policy. Vincent Fioretti, however, argued that under the policy's incontestability clause, MassGen was precluded from disclaiming coverage for any reason — including fraud — other than non-payment of premiums. The relevant clause provides as follows:

> INCONTESTABILITY
>
> This policy will be incontestable after it has been in force during the lifetime of the insured for 2 years from the date of issue except for non-payment of premiums.

Vincent Fioretti further argued that since the policy stated that its effective date was August 30, 1986, the two-year period of contestability had lapsed prior to Anthony Fioretti's death on February 28, 1989,[17] and that accordingly he was entitled to the

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17. MassGen argues that there is a question whether the contestability period had actually lapsed at the time of Anthony Fioretti's death. Specifically, MassGen argues that the contestability period does not run from the policy's stated date of issue (August 30, 1986), but rather from the first date of coverage (September 25, 1987), *i.e.*, the date upon which the policy began to be "in force." However, since the policy defines the term "date of issue" by reference to the "date of issue shown on [the] Policy Data Page" (August 30, 1986), and as the contestability period is defined as "2 years from the date of issue," MassGen's construction seems strained. *See Mutual Life Ins. Co. of N.Y. v. Hurni Packing Co.*, 263 U.S. 167, 174-78, 44 S.Ct. 90, 90-92, 68 L.Ed.235 (1923); *but cf.* 1A John Alan Appleman & Jean Appleman, *Insurance Law and Practice* § 312 (1981). This issue was not, however, addressed by the district court, and, given our ultimate resolution of this case, we likewise decline to resolve this question. We also find it unnecessary to decide

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policy's death benefits. The district court agreed with MassGen and concluded that an "imposter defense" exists which removes the bar on coverage disputes otherwise imposed by an incontestability clause. Accordingly, the district court entered judgment in favor of MassGen and rescinded the policy.

II.

There is little doubt that this dispute presents, on its face, a conflict-of-laws problem, namely whether the governing law is to be supplied by New York, New Jersey, or Florida.[18] The district court recognized this problem, but ultimately concluded that it "need not resolve the choice of law question . . ., because [the court found] that neither New York, New Jersey, nor Florida law bars proof of imposture [as a defense in an insurance coverage action] despite the existence of an incontestability clause."[19] Accordingly, the district court found it unnecessary to undertake any formal conflict-of-laws analysis in order to determine the

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whether Anthony Fioretti's continuing acts of fraud operated to toll the running of the contestability period. See, *e.g.*, *Spear v. Guardian Life Ins. Co. of Am.*, 112 A.D.2d 904, 493 N.Y.S.2d 322, 325 (1985), *appeal dismissed*, 67 N.Y.2d 647, 499 N.Y.S.2d 1030, 490 N.E.2d 558, *and appeal dismissed*, 67 N.Y.2d 605, 501 N.Y.S.2d 1023, 492 N.E.2d 794 (1986).

18. The parties have apparently conceded — and we agree — that there are no other viable candidates (*e.g.*, Colorado) to be considered in this conflict-of-laws problem.

19. This represents a marked departure from the district court's prior resolution of this question. For example, in its November 15, 1990 memorandum opinion denying, on a motion for reconsideration, the first of Vincent Fioretti's many motions for summary judgment, the district court concluded that "these states' law differ as to the controlling legal issues in this action."

controlling law. Instead, the district court appears to have followed a conflict-of-laws principle that has been applied to this species of "false conflict" cases.[20] Simply stated, this principle is that, when the laws of the competing states are substantially similar, the court should avoid the conflicts question and simply decide the issue under the law of each of the interested states.[21] *See Bomar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1387-88 & n. 17 (11th Cir. 1988; *accord Lucker Mfg. v. Home Ins. Co.*, 23 F.3d 808, 813 (3d Cir.1994). We review conflict-of-laws issues *de novo. Shapiro v. Associated Int'l Ins. Co.*, 899 F.2d 1116, 1118 (11th Cir.1990); *American Family Life Assurance Co. v. United States Fire Co.*, 885 F.2d 826, 830 (11th Cir.1989).

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20. *See Hurtado v. Superior Court of Sacramento County*, 11 Cal.3d 574, 114 Cal.Rptr. 106, 109, 522 P.2d 666, 669 (1974) ("The fact that two [or more] states are involved does not in itself indicate that there is a 'conflict of laws' or 'choice of law' problem. There is obviously no problem where the laws of the two states are identical."); *see also* Eugene F. Scoles & Peter Hay, Conflict of Laws § 2.6 at p. 17 (1984) ("A 'false conflict' exists when the potentially applicable laws do not differ. . . ."); *cf.* Restatement (Second) of Conflict of Laws § 1 cmt. b (1971).

21. From a strictly analytical perpective, it is somewhat questionable, given the *Klaxon* doctrine, whether it is appropriate for a federal court, sitting in diversity, to adopt such an approach when confronted with this species of "false conflict" cases (unless, of course, the forum state's courts would do likewise). *See Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3, 4-5, 96 S.Ct. 167, 168, 46 L.Ed.2d 3 (1975) (per curiam) ("[T]he conflict-of-laws rules to be applied by a federal court . . . must conform to those prevailing in the [forum's] state courts."). However, when it is *plainly clear* that there is no difference in the substantive law of the competing states, this mode of analysis may, arguably, be resorted to, as it will ultimately yield the correct result. *See* Robert A. Leflar, Luther L. McDougal, III & Robert L. Felix, American Conflicts Law § 92 at p. 272-73 (4th ed. 1986). Alternatively, the court could simply apply the law of the forum state, another method of deciding this brand of "false conflicts" cases. *E.g., Stamp v. Department of Labor & Indus.*, 122 Wash.2d 536, 859 P.2d 597, 600 (1993); *Lutz v. Demars*, 559 N.E.2d 1194, 1196 n. 1 (Ind.Ct.App. 1990); *see also Forsyth v. Cessna Aircraft Co.*,

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Appendix B

In order to determine whether the district court answered the conflict-of-laws question properly, it appears that we must first decide whether the court correctly interpreted the law of New York, New Jersey and Florida on the controlling legal question, *i.e.*, whether these states recognize the "imposter defense" in life insurance coverage actions involving an incontestability clause.[22] We review the district court's interpretation of state law *de novo*. *Salve Regina College v. Russell*, 499 U.S. 225, 231-33, 111 S.Ct. 1217, 1221-22, 113 L.Ed.2d 190 (1991); *Insurance Co. of N. Am. v. Lexow*, 937 F.2d 569, 517 (11 Cir.1991).

As the district court below correctly recognized, neither the Supreme Court of Florida, the Supreme Court of New Jersey, nor the New York Court of Appeals, have ever addressed the question whether their respective jurisdictions recognize the "imposter defense." Indeed, there is presently not a single reported decision from *any state court* in these jurisdictions addressing this precise

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520 F.2d 608, 611-12 (9th Cir. 1975) (applying Oregon law). Both approaches will produce the correct result; however, the latter enjoys the additional virtues of being more streamlined and less time-consuming, since only one body of law need be employed to resolve the dispute. *See McNall v. Tatham*, 676 F.Supp. 987, 995 n. 10 (C.D.Cal. 1987).

22. This "imposter defense" was first articulated in the case of *Maslin v. Columbian Nat'l Life Ins. Co.*, 3 F.Supp. 368 (S.D.N.Y.1932). That case involved a life insurance policy that was procured after an imposter had posed as the insured during a medical exam required by the insurer. Because this fraud was not discovered until after the contestability period had lapsed, the district court concluded, as a matter of New York insurance law, that the policy's incontestability clause barred the insurer from disclaiming coverage. *Id.* at 369. However, the district court concluded that principles of New York contract law offered a different defense to the insurer. Specifically, the district court held that when an imposter is used to secure an insurance policy, there can be no "meeting of the minds" between
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legal issue.[23] This fact alone counsels against the district court's treatment of the conflict-of-laws issue presented by this case. In the total absence of any relevant precedent, it becomes necessary to attempt to prognosticate how these state courts would resolve the "imposter defense" issue. *See Towne Realty, Inc. v. Safeco Ins. Co. of Am.*, 854 F.2d 1264, 1269 n. 5 (11th Cir.1988); *Wammock v. Celotex Corp.*, 835 F.2d 818, 820 (11th Cir.1988). However, without any such precedent it is, quite simply, impossible to say with certainty what the law of these states actually is, not to mention whether these states' laws are identical. Accordingly, we choose not to follow the analytical approach adopted by the

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the insurer and the insured on an essential element of the contract, namely the identity of the insured. Hence, the insurance contract was held never to have been binding or enforceable vis-a-vis the named insured (though the court commented that the imposter might have been able to enforce the policy). *Id.* at 369-71.

23. There are, however, federal decisions addressing this question. In *Strawbridge v. New York, Life Ins. Co.*, 504 F.Supp. 824, 830 (D.N.J. 1980), a federal district court held that New Jersey law recognizes the "imposter defense." And while *Maslin v. Columbian Nat'l Life Ins. Co., supra*, was a case that pre-dated *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), this decision relied almost exclusively on New York case law, and as such we believe that this case can be viewed as an expression of New York common law. While these decisions are informative, they cannot, however, be viewed as representing a definitive answer to these questions of state law. *See Spencer Boat Co. v. Liutermoza*, 498 F.2d 332, 333 n. 3 (5th Cir. 1974).

We also are cognizant of our decision in *Bankers Security Life Ins. Society v. Kane*, 885 F.2d 820, 822 (11th Cir.1989), in which we expressed our opinion that Florida law does not appear to recognize the "imposter defense." The district court, however, chose not to adopt this construction of Florida law, concluding that this portion of our opinion was "properly understood as dicta." Given our ultimate resolution of this dispute, we need not decide whether the district court properly interpreted the scope of our opinion in *Kane*.

district court. Rather, in a case such as this we believe that the more prudent course is for the court to undertake a traditional conflict-of-laws analysis, determine the controlling law, and then attempt to answer the relevant legal question under the law of that state. *See Day & Zimmerman, Inc. v. Challoner, supra,* 423 U.S. at 4-5, 96 S.Ct. at 168. This approach reduces the likelihood that an error of state law will infect the proceeding, since the court will only be required to interpret the unsettled law of one jurisdiction. *Cf. Delahanty v. Hinckley,* 845 F.2d 1069, 1070 (D.C.Cir.1988) (a federal court sitting in diversity should refrain, as much as possible, from speculating on unsettled questions of state law; *Melville v. American Home Assurance Co.,* 584 F.2d 1306, 1311 n. 7 (3d Cir.1978) (same).

Since this is a diversity action, we are required to apply the substantive law of the forum state, namely Florida, *Erie R.R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), including its conflict-of-laws rules. *Klaxon Co. v. Stentor Elect. Mfg. Co.,* 313 U.S. 487, 496, 61 S.Ct. 1020, 1021, 85 L.Ed. 1477 (1941); *Bryan v. Hall Chem. Co.,* 993 F.2d 831, 834 (11th Cir.1993). When resolving conflict-of-laws issues in contract actions, the Florida Supreme Court has unambiguously indicated its intent to reject the more modern (and flexible) "significant contacts" analysis of the second Restatement of the law of conflicts,[24] or the "center of gravity" analysis first pioneered by the New York Court of Appeals,[25] choosing instead to adhere to the traditional rule of *lex loci contractus. Goodman v. Olsen,* 305 So.2d 753, 755 (Fla.1974); *accord Walling v. Christian & Craft Grocery Co.,* 41 Fla. 479, 27 So. 46, 49 (1899). The doctrine of

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24. See Restatment (Second) of Conflict of Laws § 188 (1971); see also *id.* § 192.

25. See *Auten v. Auten,* 308 N.Y. 155, 124 N.E.2d 99 (1954).

lex loci contractus directs that, in the absence of a contractual provision specifying the governing law,[26] a contract (other than one for the performance of services) is governed by the law of the state in which the contract is made, *i.e.*, where the last act necessary to complete the contract is done. *Equitable Life Assurance Soc'y of the U.S.A. v. McRee*, 75 Fla. 257, 78 So. 22, 24 (1918); *Lacy v. Force V Corp.*, 403 So.2d 1050, 1056 (Fla.Dist.Ct.App.1981); *Jemco, Inc. v. United Parcel Serv., Inc.*, 400 So.2d 499, 500 (Fla.Dist.Ct.App.1981), *review denied*, 412 So.2d 466 (Fla.1982); *see also* Robert A. Leflar, Luther L. McDougal, III & Robert L. Felix, American Conflicts Law § 145 at p. 145-46 (4th ed. 1986). The Florida Supreme Court has not recently had occasion to apply this doctrine in the context of a life insurance dispute. However, the Florida court has expressly held that the principle of *lex loci contractus* applies to automobile insurance contracts, *Lumbermens Mut. Casualty Co. v. August*, 530 So.2d 293, 295 (Fla.1988); *Sturiano v. Brooks*, 523 So.2d 1126, 1129-30 (Fla.1988), concluding that because ours is a migratory society, Florida's public policy favors a rigid conflict-of-laws rule in such disputes, and counsels against a more flexible rule that could possibly "allow one party to modify the contract simply by moving to another state," since such a rule "would substantially restrict the power to enter into valid, binding, and stable contracts."[27] *Sturiano v. Brooks, supra*, 523 So.2d at 1130. Since this rationale applies with equal (if not

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26. It is undisputed that the insurance policy in this case contained no such clause.

27. Obviously, the basic assumption behind the *lex loci contractus* doctrine is that when a contract is executed in a particular state, the parties can be assumed to have intended to have that state's laws govern their contractual relationship. *See Sturiano v. Brooks, supra*, 523 So.2d at 1129; *Milliken v. Pratt*, 125 Mass. 374, 382-83 (1878); *cf.* Restatement of Conflict of Laws § 332 cmt. c (1934).

greater) force to contracts insuring the life of an automobile's driver (or passenger) as it does to contracts insuring the automobile itself, we have little doubt that, under Florida law, the *lex loci contractus* doctrine also applies to the life insurance policy at issue in this dispute.[28] *Confederation Life Ass'n v. Vega Y Arminan,* 207 So.2d 33, 36-37 (Fla.Dist.Ct.App.), *aff'd and cert. discharged,* 211 So.2d 169 (Fla.), *cert. denied,* 393 U.S. 980, 89 S.Ct. 450, 21 L.Ed.2d 441 (1968); *see also Santovenia v. Confederation Life Ass'n,* 460 F.2d 805, 809-10 (5th Cir.1972) (applying Florida conflicts law).

In this case, MassGen agreed to underwrite Anthony Fioretti's life insurance policy, contingent only upon his execution of the Statement of Good Health. Since MassGen expressly conditioned its approval of Anthony Fioretti's application on this one event (as opposed, to say, his tendering of the first required premium),[29] we agree with the parties' mutual position, as expressed during oral argument, that the execution of the Statement of Good Health was the last event necessary to complete this contract. *See Equitable Life Assurance Soc'y of the U.S.A. v. McRee, supra,* 78 So. at 24. Therefore, since this Statement of Good Health was executed in New Jersey, we

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28. In *Shapiro v. Associated Int'l Ins. Co., supra,* we declined to extend Florida's *lex loci contractus* rule to contracts insuring real property, concluding that the migration rationale of *Sturiano* does not apply to contracts insuring real (*i.e.,* immovable) property. 889 F.2d at 1119-21. This distinction clearly has little, if any, application in the present case. In any event, we are "bound to adhere to decisions of the state's intermediate appellate courts absent some persuasive indication that the state's highest court would decide the issue otherwise." *Silverberg v. Paine, Webber, Jackson & Curtis, Inc.,* 710 F.2d 678, 690 (11th Cir.1983).

29. Although the record indicates that Anthony Fioretti paid all his premiums in accordance with the timetable established by the policy, it does not indicate when (or where) these payments were made.

conclude that, under Florida's conflict-of-laws rules, New Jersey's substantive insurance law governs this dispute.[30]

III.

Under New Jersey law, an insurer is required to include an incontestability clause in any policy of life insurance. N.J.Stat.Ann. § 17B:25-4 (West 1985) provides:

> There shall be a provision that the policy (exclusive of provisions of the policy or any contract supplemental thereto relating to disability benefits or to additional benefits in event of death by accident or accidental means or in event of dismemberment or loss of sight) shall be incontestable, except for nonpayment of premiums, after it has been in force during the lifetime of the insured for a period of 2 years from its date of issue.

As Vincent Fioretti correctly points out, the incontestability clauses contemplated by such statutes are generally construed as statutes of limitations that, upon expiration, preclude all coverage defenses, including fraud. *See generally* 18 George J. Couch, Ronald A. Anderson & Mark S. Rhodes, Couch Cyclopedia of Insurance Law §§ 72:70 to 72:76 (2d ed. rev. ed. 1983); 1A John Alan Appleman & Jean Appleman, Insurance Law and Practice §§ 332 to 334 (1981). This principle found support in some early New Jersey cases. *See Prudential Ins. Co. of Am. v. Connallon*, 154 A. 729, 730 (N.J.Ct.Err. & App.1931); *but see Metropolitan Life Ins. Co. v. Tarnowski*, 20 A.2d 421, 423-

30. The district court likewise concluded that "New Jersey would supply the rule of decision under the lex loci contractus approach."

24 (N.J.Ct.Err. & App.1941). However, in a recent decision involving the incontestability clause of a life insurance policy governed by § 17B:25-4, the New Jersey Supreme Court explicitly stated that this statute does not prevent a life insurer from denying coverage when its insured has committed fraud in securing coverage. The New Jersey court explained:

> Even after the expiration of the contestability period, an insurer may deny a claim if the insured committed fraud in the policy application. *Paul Revere Life Ins. Co. v. Haas,* 137 N.J. 190, 644 A.2d 1098 (1994). To rescind a policy, an insurer need not show that the insured actually intended to deceive. *Massachusetts Mut. Life Ins. Co. v. Manzo,* 122 N.J. 104, 114 584 A.2d 190 (1991). Even an innocent misrepresentation can constitute equitable fraud justifying rescission. *Metropolitan Life Ins. Co. v. Tarnowski,* 130 N.J.Eq. 1, 3-4, 20 A.2d 421 (E. & A. 1941).

Ledley v. William Penn Life Ins. Co., 138 N.J. 627, 651 A.2d 92, 95 (1995).[31]

Since New Jersey law permits an insurer to rescind even when its insured has committed an innocent misrepresentation, it seems obvious that New Jersey law would also recognize the "imposter defense," as the fraud in such a case is far more egregious. In any event, we need not resolve this question. It is

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31. Since the contestability period had not lapsed in the *Ledley* case, this portion of the court's opinion is technically dicta. We nevertheless view the New Jersey court's discussion as an informed (and accurate) exposition of New Jersey law. *See Towne Realty, Inc. v. Safeco Ins. Co. of Am., supra,* 854 F.2d at 1269 n. 5.

undisputed that Anthony Fioretti knowingly misrepresented his HIV-positive status, as well as other health-related information, in both the final policy application and the Statement of Good Health. Thus, under New Jersey law, these misrepresentations which were undoubtably material to the underwriting process, plainly constitute a sufficient basis to support MassGen's denial of Vincent Fioretti's claim and its recision of the disputed policy, even if it is assumed that the contestability period expired prior to Anthony Fioretti's death. *See id.* 651 A.2d at 95-97; *see also Paul Revere Life Ins. Co. v. Haas,* 137 N.J. 190, 644 A.2d 1098, 1106-08 (1994) (even after lapse of contestability period, a health insurer may deny coverage based on insured's nondisclosure of a serious illness in his insurance application); *Johnson v. Metropolitan Life Ins. Co.,* 53 N.J. 423, 251 A.2d 257, 263-67 (1969) (recision authorized when insured knowingly misrepresents material health information to health insurer); *Urback v. Metropolitan Life Ins. Co.,* 32 A.2d 337, 338-39 (N.J.Ct.Err. & App.1943) (same when misrepresentations made to life insurer). Accordingly, the judgment of the district court is

AFFIRMED.

APPENDIX C — FINDINGS OF FACT AND CONCLUSIONS OF LAW FILED SEPTEMBER 24, 1993

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 90-6530-CIV-MARCUS

VINCENT FIORETTI,

Plaintiff,

v.

MASSACHUSETTS GENERAL LIFE INSURANCE COMPANY,

Defendant.

MASSACHUSETTS GENERAL LIFE INSURANCE COMPANY,

Counterplaintiff,

v.

VINCENT FIORETTI

Counterdefendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE was tried without a jury before the undersigned on December 28 and 29, 1993. Plaintiff, Vincent

Appendix C

Fioretti is the named beneficiary of a life insurance policy issued by Defendant, Massachusetts General Life Insurance Company ("Mass General") to Plaintiff's brother, Anthony Fioretti. Anthony Fioretti died in Florida on February 28, 1989, and Plaintiff made a claim for the insurance proceeds which Mass General declined. Plaintiff, by this action sues for $1,947,111.00 allegedly due under the policy. Mass General defends against the complaint and counterclaims for rescission of the policy, claiming that it was procured by fraud. Plaintiff seeks to deny this defense and defends against the counterclaim on the basis that the incontestability clause in the policy bars the defense of fraud. Plaintiff is a citizen of Florida and Defendant is incorporated in Massachusetts with its principal place of business in Colorado, and thus the action was properly removed based on diversity jurisdiction, 28 U.S.C. § 1332. Accordingly, pursuant to Fed. R. Civ. P. 52(a) the Court makes the following Findings of Fact and Conclusions of Law.

I. *Findings of Fact*

1. In November of 1986, Anthony Fioretti applied to Columbian Mutual Life for a $100,000 life insurance policy. The application showed his correct name and his correct birthdate, September 6, 1948. Blood drawn from him in January 1987 tested HIV reactive. As a result, Columbian Mutual never issued a policy insuring Fioretti.

2. On February 10, 1987, Anthony Fioretti applied to Mass General for a life insurance policy. This time, he indicated his name as "C. Tony Fioretti" and falsely stated his date of birth as "3-6-47." D. Ex. 12. Under the heading "Requested Issue Date" he wrote "Date Policy — 8/30/86." *Id.*

3. The application stated that it was "signed at Tamarac Fla., 2/10/87." *Id.* It designated the owner of the plan as "Shields & Warendorff Florist, Inc. Pension Plan." Anthony Fioretti, was the president and sole shareholder of Shields & Warendorff Florists, Inc., a florist shop located in New York, New York. It recited the residence of the insured as both New York, New York and Tamarac, Florida. The broker for the policy was Kirsner, Stern & Slavutin, Inc., located in New York, New York, and Stuart Kirsner was the agent on this application. *See* Pretrial Stip. ¶ 5. The signature of "Stuart Kirsner" appears as "Licensed Agent," but one Suzanne Kaplon-Harmon, a clerk in the broker's New York office, in fact signed Kirsner's name with the permission of Kirsner and other principals of the firm. Kaplon-Harmon never saw Fioretti sign the application, and did not know where it was signed, yet she wrote "Tamarac, Fla." as the being the place the application was signed. *See* Harmon Depo. at 16-17; Pretrial Stip. ¶ 12.

4. Although Mass General is licensed to do business in Florida, and Florida has approved the relevant policy form, Mass General refused to write the policy on the February application because the designated soliciting agent, Kirsner, was not licensed to do business in Florida.

5. In connection with the first application, Plaintiff conceded at trial that the blood of a person other than the insured was tested for AIDS in July 1987 at the Spring Medical Group in New York City. *See* D. Ex. 23. Either an imposter appeared for the blood test, or the insured somehow arranged for the substitution of another person's blood sample for his. The blood tested non-reactive to the HIV antibody.

6. On September 8, 1987, a second application was filed by

Anthony Fioretti. D. Ex. 24. The application was substantially similar to the February application — proposing "C. Tony Fioretti" as the insured, again designating the Pension Plan as the owner of the policy, reiterating the false birthdate, showing the insured's residence as both New York and Florida, and requesting the policy to run retroactively from August 30, 1986. Significantly, however, this time the application indicated that it was signed in Newark, New Jersey on September 8, 1987. D. Ex. 24. Again, Susan Kaplon-Harmon, a clerk in the broker's New York office, wrote "Newark, New Jersey" on the application, although she did not know whether it had been signed there. Pretrial Stip. at ¶ 15. As it turns out, the policy form was not approved in New Jersey, *see* Pretrial Stip. at ¶ 16, nevertheless, it was issued there.

7. Mr. Gary Yeargler, the underwriter at Mass General responsible for the Fioretti risk, testified that he relied on the negative blood test for HIV submitted in connection with the first application in approving Anthony Fioretti's second application for life insurance. Mass General relied on the results of the fraudulent blood test in issuing the subject life insurance policy, such that had Anthony Fioretti himself submitted to a blood test as Mass General required, Mass General never would have underwritten the policy.

8. Because some time had lapsed between the test and the approval of the application, Yeargler and Mass General accepted the application subject to Anthony Fioretti's executing a Statement of Good Health and Insurability. Pretrial Stip. at ¶ 17; D. Ex. 26. Anthony Fioretti signed the Statement, and Kaplon-Harmon filled in spaces indicating that the Statement was executed in New Jersey on September 25, 1987. Pretrial Stip. at

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¶ 18. By that Statement, the insured represented to the best of his knowledge and belief that:

> (1) I have continued in good health.
>
> (2) I have not made an application for insurance which has been declined, postponed or modified.
>
> (3) I have not consulted or been examined by a physician or practitioner.

D. Ex. 26.

9. At the time he signed that Statement, however, Anthony Fioretti knew that he was HIV-positive, had been declined life insurance by Columbian Mutual, and had consulted with at least two doctors about his HIV, Kaposi's sarcoma and AIDS. *See* Laubenstein Depo. at 33-34, 42-43.

10. The issued policy was backdated to August 30, 1986, as requested on both applications. Pretrial Stip. ¶ 19; D. Ex. 27, at 2 ("Notification of Participation").

11. After the policy had been approved and issued, on December 14, 1987 Anthony Fioretti applied to Mass General for an additional benefit called "Waiver of Premium." In exchange for an additional premium, this benefit provides that the insurer will not require payment of any premiums during the insured's period of total disability. The application for this benefit required that Fioretti answer the following two questions:

> (4) Has the insured or any named dependent

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> . . . received advice or treatment from a physician or other medical or physical practitioner within the past three years?
>
> (5) To the best of your knowledge and belief does the insured or any listed Dependent have any physical or mental disease or disorder?

D. Ex. 29, at 2. Anthony Fioretti checked the adjacent boxes labelled "no" to each question. Again, this was not true.

12. As a result of Fioretti's request for the additional benefit, Yeargler, on behalf of Mass General, queried the "Medical Information Bureau," an insurance company information network, about Fioretti. The resulting reports flagged the possibility of a health disorder, and as a consequence of that information, Mass General required Anthony Fioretti to submit to *another* blood test. *See* D. Ex. 30.

In April of 1988, Anthony Fioretti again somehow substituted someone else's blood, and the blood sample tested negative for the HIV antibody. *See* D. Ex. 31, 32. Yeargler relied on this report and approved the waiver of premium benefit, but it never went into effect because Fioretti did not pay the additional premium.

13. On February 28, 1989, Anthony Fioretti died in Florida. Pretrial Stip. at ¶ 27. All premiums due prior to that date had been paid. Pretrial Stip. at ¶ 28.

14. Vincent Fioretti filed a claim as the beneficiary under the insurance policy with Mass General. In December 1989, Mass

General denied the claim and tendered the premiums paid to counsel for Vincent Fioretti, but the tender was rejected.

14. The issued policy contained the following clause:

> **INCONTESTABILITY**
>
> This policy will be incontestable after it has been in force during the lifetime of the insured for 2 years from the date of issue except for non-payment of premiums.

D. Ex. 27, at 13.

II. *Conclusions of Law*

1. Since there is no dispute that HIV-negative blood was fraudulently substituted for the HIV-positive blood of the insured, and since we have found that Mass General would not have underwritten the life insurance policy had Anthony Fioretti's HIV-positive condition been revealed by the required blood test, and since we have found Anthony Fioretti made other fraudulent statements to Mass General in connection with his application, we conclude that Anthony Fioretti fraudulently induced Mass General to enter into the life insurance contract upon which the parties now sue.

2. The question to be resolved is whether the incontestability clause contained in the contract, or in the relevant state-law statutes, bars the pleading of fraud by Mass General under the facts of this case. Plaintiff argues that even accepting that Vincent Fioretti fraudulently induced the life insurance contract, Mass General is barred from raising the

defense by the incontestability clause in the contract. Mass General urges us to apply the narrow "imposter exception" which has been recognized by several courts. Such an exception to the rule of incontestability would permit the insurance company to raise the defense of fraud to the enforcement of a life insurance contract, otherwise barred after the running of the contractual or statutory incontestability period, where the particular fraud alleged is that an impostor appeared for the medical examination. Plaintiff, in turn, dismisses the "impostor" defense as wholly inapplicable to his claim, reasoning that the "impostor exception" cases permitted the defense only where the impostor showed up for the insured *medical exam.* Plaintiff points out that Anthony Fioretti substituted an impostor's blood for the *blood test only*; he urges that a blood test is different from a medical exam; and therefore asks the Court to find the impostor cases inapposite.

Should this argument fail, Plaintiff maintains that state law must be applied to this case, that Florida is the correct choice of law in this case, and that Florida law — as interpreted by the United States Court of Appeals in *Bankers Security Life Ins. Co. of New York v. Kane,* 885 F.2d 820 (11th Cir. 1989) — does not recognize an "impostor exception" to the rule of incontestability. Mass General counters this with two arguments: First, that the insurance policy was part of an ERISA plan, and therefore federal common law should be applied; Mass General reads federal common law — as derived primarily from *Maslin v. Colombian Nat. Life Ins. Co.,* 3 F. Supp. 368 (S.D.N.Y. 1932) — as allowing an "impostor exception." Second, if state law applies, New York or New Jersey law govern under the correct application of choice of law principles, and both states recognize the "impostor exception." Finally, if Florida law applies, Mass General disputes *Kane's* reading of Florida law.

3. We need not resolve the choice of law question of whether the law of New York, New Jersey or Florida governs this action, nor need we decide the issue — raised for the first time at trial — of whether the insurance policy was part of an ERISA plan such that federal common law should be here fashioned, because we find that neither New York, New Jersey nor Florida law bars proof of imposture despite the existence of an incontestability clause.

4. Incontestability clauses in life insurance policies serve the beneficent public policy of repose for insureds. They strike a balance between the ability of unscrupulous insurance companies to dangle the Damocles' sword of a belated fraud accusation over the aggrieved beneficiary, and the possibility of undeserved recovery where an insured commits fraud. The two-year period in the clauses, which are mandated by statute in all three states, allow a reasonable time for insurance companies to investigate applicants and the application process in order to uncover fraud, while cutting off possibly unconscionable post-hoc defenses. A line of caselaw and commentators have carved out a very narrow exception to this otherwise-ironclad bar: where an impostor attends the requisite medical examination because the insured's health would have precluded his insurability, the insurance companies should be able to raise imposture as a defense — regardless of the existence of an incontestability clause — because the insurance company had actually intended to insure the life of the impostor rather than the life of the person whose name appeared atop the application. *See e.g., Obartuch v. Security Mutual Life Ins. Co.*, 114 F.2d 873 (7th Cir. 1940), *cert. denied*, 312 U.S. 696 (1941); *Unity Mutual Life Ins. Co. v. Moses*, 621 F. Supp. 13 (E.D. Pa.), *aff'd*, 780 F.2d 1015 (3d Cir. 1985); *Strawbridge v. New York Life Ins. Co.*, 504 F. Supp. 824 (D. N.J. 1980); *Maslin v. Columbia National Life Ins. Co.*, 3 F. Supp. 368

(S.D.N.Y. 1932); *Ludwinska v. John Hancock Mutual Life Ins. Co.*, 317 Pa. 577, 178 A. 28 (1935); *Pettacio v. New York Life Ins. Co.*, 125 Pa. Super. 15, 189 A. 697 (1937); 18 Couch Cyclopedia of Insurance Law § 72:73 at 339 (2d ed. Mark S. Rhodes, 1983); 7 Couch Cyclopedia of Insurance Law § 37:330 at 922; John A. Appleman and Jean Appleman, 12 Insurance Law and Practice, § 7123 at 469-72 (1981). Essentially, these courts skirt the unambiguous mandate of the incontestability clause by reasoning that there was never any "meeting of the minds" between the insurer and the *insured*; rather, if the insurer contracted with anyone, it was with the impostor.

5. The stated motivating rationale for the exception is somewhat formalistic since falsification of the medical examination is another brand of fraudulent inducement, alongside other fraudulent statements about age, past illnesses, family history, occupation, etc. The difference between imposture and the latter types of fraud is more precisely understood not as one of kind, as the cases suggest, but rather as one of marked degree. The medical examination is the linchpin of the life insurance application. It is the determinative event for the formation of the contract. The substitution of an impostor for the insured at the medical examination is such a serious and shocking strain of fraud precisely because it is so stealthily ingenious — piercing right to the heart of the deal, and virtually impossible for the insurance company to detect through reasonable and ordinary business procedures. For this last reason, and to prevent manifest injustice, this line of authority prevents the beneficiary of an impostor's disguise from again cloaking himself— this time in the protection of the incontestability clause.

6. In sum, the incontestability clause is designed to promote stability by creating a reasonable expectation by the insured that a

claim on a valid policy will be paid. Not once in the course of this litigation has Plaintiff contended that Anthony Fioretti had any reasonable expectation of payment, or that the policy was valid when it was issued. Accordingly, in this particular case, no reasonable expectations would be defeated by permitting the impostor defense. We next turn to an examination of the few cases on the subject to determine whether the law of New York, New Jersey and Florida would tolerate such an exception to the incontestability rule.

7. New York requires the inclusion of a two-year incontestability clause in all life insurance policies delivered, or issued for delivery in New York:

> § 3203. Individual life insurance policies; standard provisions as to contractual rights and responsibilities of policyholders and insurers.
>
> (a) All life insurance policies, except as otherwise stated herein, delivered or issued for delivery in this state, shall contain in substance the following provisions, or provisions which the superintendent deems to be more favorable to policyholders:
>
> * * *
>
> (3) that the policy shall be incontestable after being in force during the life of the insured for a period of two years from its date of issue . . . except . . . for nonpayment of premiums or

> violation of policy conditions relating to service in the armed forces.

N.Y. Ins. Law § 3203 (McKinney 1993).

The only court sitting in New York to have confronted the question of the impostor exception is the district court in *Maslin v. Columbian National Life Ins. Co., supra.* In that 1932 suit by the beneficiary of a life insurance contract against the insurance company that refused to honor his claim, the court struck the defense that the agent conspired with the insured to defraud the underwriter, but permitted the defendant to offer proof of imposture. The insurance company alleged that the insured had been suffering from tuberculosis for years before his application, and in order to secure issuance of the policy, sent an impostor to the physical examination. The court, based on a canvass of analogous New York cases, found as follows:

> I think it equally clear, however, that the other defense the alleged impersonation of Samuel Maslin by another who is said to have made the application and, more important still, to have taken the physical examination, is not barred by the incontestability clause. In substance, the defendant's position is that it never insured the life of the plaintiff's son at all and never had any dealings with him; that the man it insured was another person altogether, a healthy man whom the defendant's medical examiner saw and accepted as a risk and who chose to call himself Samuel Maslin; further, that there is nothing to show that this man is dead or that

> the plaintiff had any insurable interest in his life. In reality, this is not an affirmative defense at all; it may be proved under the denial that the defendant insured the life of Samuel Maslin. If the facts pleaded are borne out by the proof, the defendant is under no liability to the plaintiff. *There cannot be the slightest doubt that the person whom an insurance company intends to make a contract with and intends to insure is the person who presents himself for physical examination.*

Maslin, 3 F. Supp. at 369-70 (emphasis added). Admittedly, *Maslin* predates *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), and thus does not necessarily construe New York state common law. We have not found any subsequent New York case on the topic; and the absence of any contrary decision by the New York court at least permits a reasonable inference that *Maslin* indicates the rule that New York would follow.

Cases cited by Plaintiff for the proposition that *Maslin* ignores New York's strict enforcement of the incontestability clause are not controlling; they confronted the more general question of whether the defense of fraud at the inception of the contract would be barred by the incontestability clause. *See Metropolitan Life Ins. Co. v. Conway*, 252 N.Y. 449 (1930) (Cardozo, C.J.) (holding that policy rider providing that policy shall be void if death results from non-fare-paying aircraft travel was not inconsistent with statutory incontestability rule); *Apter v. Home Life Ins. Co. of New York*, 194 N.E. 846, 847-48, 266 N.Y. 333, 337-38 (1935) (incontestability clause in health benefits policy would bar avoidance of policy based on fraudulent

nondisclosure of tuberculosis, but would not bar defense that disease was not covered because it originated prior to issuance); *Spear v. The Guardian Life Ins. Co.*, 493 N.Y.S.2d 322, 324 (N.Y. App. Div. 1985)[1].

Further, we are not persuaded that the New York State legislature has precluded such an exception. As cited above, section 3203 of N.Y. Ins. Law sets out the required incontestability clause in life insurance contracts. Section 3216 of N.Y. Ins. Law prescribes the regulations for "individual accident and health insurance policy provisions." The statute bars the use — beyond two years after the individual accident or health insurance policy was issued — of misstatements, except for fraudulent misstatements in denying a claim for loss or disability. N.Y. Ins. Law § 3216(d)(1)(B)(i). The statute further provides that after two years from the date of issue,

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1. In fact, *Spear* favors the Defendant's position. In *Spear* the insured sued for a declarator judgment that the insurer had wrongfully terminated coverage under a group health benefits policy. The New York Supreme Court, Appellate Division, found that the incontestability clause barred counterclaims by the insurer for fraudulent representations in the application and fraudulent non-disclosure of prior injury. The court held that counterclaims alleging that the insured was not an eligible employee at the time she applied to group health policy, which counterclaims would ordinarily be inadmissible under the incontestability clause, could be litigated because "defendant alleges that during its investigation false information was provided to it by [the insured] . . . to prevent defendant from commencing an action to rescind coverage under the incontestable clause." *Spear*, 493 N.Y.S. 2d at 325.

Similarly, in the case at bar, Anthony Fioretti made continuing misrepresentations to the insurance company during the incontestable period which impeded defendant's discovery of the fraud: the false Statement of Good Health, *see* FF No. 8; the false Waiver of Premium application, *see* FF No. 11; and the April 1988 (second) blood test submitted to by an impostor, *see* FF No. 12

> no insurer shall refuse to renew a policy of hospitalization or surgical or medical expense insurance or refuse to renew any other policy in which one-third or more of the total premium is allocable to hospital, surgical or medical expense benefits, or any combination thereof, except for one or more of the following reasons: fraud in applying for the policy or in applying for any benefits under the policy, moral hazard, overinsurance or duplication of benefits according to standards on file with the superintendent, discontinuance of a class of policies, and such other reasons, including but not limited to, the filing of false or improper claims, as the superintendent may approve . . . .

N.Y. Ins. Law § 3216(g). The next subsection then states that "[t]his section shall not apply to or affect . . . (6) Life insurance . . . contracts . . . ." N.Y. Ins. Law § 3216(h).

We do not agree with Plaintiff that the conclusion — that New York would not recognize the quite limited impostor exception — necessarily flows from the proposition that § 3216 (the individual accident and health insurance regulation section) expressly permits fraud as a defense after the running of the incontestability period, and the life insurance section does not. Simply, the two categories of policies are wholly distinguishable and involve entirely disparate methods of dealing and performance. There are strong justifications for permitting fraud defenses to non-life-insurance contracts. These justifications lose all force in the context of life insurance, with one exception: the impostor defense.

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Health insurance policies — in stark contrast to life insurance policies — evince continual to-and-fro between the parties after the contract is issued: the insured becomes sick, makes a claim, part is paid, part denied; the policy runs for a limited period of time, and the insurer's risk is commensurately limited; another health exam may be ordered, and further assurances requested; the policy may be reissued, and coverage retracted or expanded. Accident insurance policies are similar: they are generally issued for a defined period; after an accident, additional premiums may be demanded for continued coverage, a new medical exam may be requested; after the policy expires, the insurer may refuse to renew. Where numerous claims are made in the course of a relationship, it would be absurd to prevent an insurance company from raising the defense that a particular claim was fraudulently manufactured simply because the policy is two-years old. Accordingly, the New York statute permits it.

Similarly, were fraud-at-the-inception barred as a defense for health and accident policies, this would bind insurance companies to the indentured position of repeatedly paying the beneficiary on a series of discrete claims where the insurance company can prove that the policy was obtained by fraud *ab initio*, and that each and every subsequent claim is fraudulent. This does not hold true for life insurance policies, which are one-shot-deals: one claim is made, and the company decides to pay or not. The possibility of subsequent claims is nonexistent. Accordingly, it is more reasonable to permit the fraud-at-the-inception defense in the context of the life insurance contract.

Likewise, it is reasonable to bar *garden-variety* fraud — as opposed to imposture — defenses after two years by the life insurance company since the possibility of a garden-variety fraud defense being raised late-in-the-game would create unseemly

leverage over the life insurance beneficiary, since the alleged perpetrator of the fraud would presumably not be around to deny the charge. In contrast, in a health or accident insurance case, claims are generally made while the beneficiary is still alive, and the alleged perpetrator can appear to defend the charge since he himself is the beneficiary; accordingly, the party asserting the defense of fraud can and should be put to its proof.

A practicality of life insurance is that the insurer may only be alerted to the possibility of fraud by the nature and timing of the just-filed claim; by this time, the beneficiary no longer has the ability to call the alleged perpetrator to rebut the defense. It would thus be unfair to permit the company to raise the defense of garden-variety fraud, and accordingly, the law bars it. Following this line of reasoning, in the life insurance case where *imposture* is alleged as a defense, the alleged perpetrator is presumably alive and susceptible to the subpoena power of the court (as, here, he was deposed), and can be required to testify to rebut the charge. Thus, it is reasonable to permit the insurer the opportunity at least to raise the defense after the incontestability period has run.

Thus, because health and accident insurance is so meaningfully different from life insurance, Plaintiff's argument — that the legislature's permitting fraud defenses to non-life-insurance policies shows that they could have made the same exception for life insurance, yet did not, and therefore we should conclude that New York certainly would not permit an impostor defense to a life insurance policy — is unpersuasive. In sum, we conclude that the New York courts would recognize the impostor exception.

8. Similarly, we find that New Jersey recognizes an impostor exception. New Jersey's legislature has mandated an incontestability requirement similar to New York's

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> There shall be a provision that the policy (exclusive of provisions of the policy or any contract supplemental thereto relating to disability benefits or to additional benefits in event of death by accident or accidental means or in event of dismemberment or loss of sight) shall be incontestable, except for nonpayment of premiums, after it has been in force during the lifetime of the insured for a period of two years from its date of issue.

N. J. Stat. Ann. § 17B:25-4 (West 1992). There appear to be no cases on point from the New Jersey state courts, but a recent decision by the district court squarely confronted the issue and clearly interpreted New Jersey law as permitting an impostor exception to incontestability. *See Strawbridge v. New York Life Ins. Co.*, 504 F. Supp. 824 (D. N.J. 1980).

In *Strawbridge*, the district court, on reconsideration, denied plaintiff's motion for summary judgment on his claim for death benefits under a life insurance policy, holding that the defendant life insurance company could present evidence at trial that "an impostor, not [the named insured], took the physical examination and therefore, was the person insured by the life insurance policy in question." *Id.* at 831. The court wrote:

> Although the New Jersey cases have never dealt with the issue of whether the incontestability clause bars proof of imposture, it is a well established principle of insurance law that the clause does not bar such proof. *See e.g., Maslin v. Columbian National Life Insurance Co.*, 3 F. Supp. 368 (S.D.N.Y. 1932), *Pettacio v. New York Life*

> *Insurance Co.*, 125 Pa. Super. 15, 189 A. 697 (1937), 12 Appleman, *Insurance Law and Practice* § 7123.

Id. at 830. The court quoted at length from *Maslin*, and then observed that "[t]his rationale does not conflict with the interpretation of the incontestability clause found in the New Jersey cases and I am confident that a New Jersey court would follow it if confronted with the issue." *Id.* We are similarly confident, can find no contrary authority from New Jersey, and — following *Strawbridge* — are persuaded that the New Jersey courts would recognize the impostor exception to incontestability.

9. Likewise, we find that Florida law concurs. Florida too has enacted an incontestability requirement for insurance companies:

> Every insurance contract shall provide that the policy shall be incontestable after it has been in force during the lifetime of the insured for a period of 2 years from its date of issue except for nonpayment of premiums and except, at the option of the insurer, as to provisions relative to benefits in event of disability and as to provisions which grant additional insurance specifically against death by accident or accidental means.

Fla. Stat. § 627.455 (1984).

We do not think that *Bankers Security Life Ins. Society v. Kane*, 885 F.2d 820 (11th Cir. 1989) controls this question. The

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United States Court of Appeals for the Eleventh Circuit, in *Kane*, read the practice of the Florida courts as refusing to adopt any exceptions to incontestability, in particular, "a fraud or impostor exception." *Id.* at 822. *Kane*, however, did not present the Court with a case of fraud by imposture, and thus *Kane's* interpretation of Florida law *as it relates to proof of imposture* is properly understood as dicta.

Kane was a suit for declaratory judgment brought by two insurance companies seeking to void a life insurance policy issued to Kane after his death. After testifying for the United States in a stock manipulation case involving organized crime figures, and after receiving death threats, Arthur Katz was included in the Federal Witness Protection Program by the Attorney General of the United States. At about the same time, Katz had pled guilty to a scheme to defraud insurance companies, and was sentenced to six months in a halfway house. Under the rubric and sanction of the Federal Witness Protection Program, Katz and his wife changed their names to Kane, relocated to Florida with new identities, social security numbers, driver's licenses, and jobs. Kane applied for two life insurance policies with the defendants, naming his wife as beneficiary, and supplying the background information to the insurance companies which the government had concocted. Kane then amassed substantial sums from investing heavily in the stock market. On October 19, 1987, the "Black Monday" stock market crash, Kane walked into his stockbroker's offices, shot and killed the office manager, wounded his broker, and then killed himself. The insurance companies contended that the policy was void *ab initio* because (1) there was no meeting of the minds as to the particulars of Kane's application, in particular his former identity; (2) the Government's creation of his false identity precluded the companies from discovering that Kane had

previously received death threats and that he had a criminal conviction for insurance fraud; and these last two facts would have resulted in the denial of his application. *See Bankers Security Life Ins. Society v. Kane*, 689 F. Supp. 1164 (S.D. Fla. 1988). The district court found that the insurance companies were precluded from contesting the policies because the two-year incontestability period had run. Importantly, the district court handily dismissed as irrelevant the cases establishing the "impostor exception" where the insurance company had insured the life of the impostor, reasoning that "[t]his, of course, is not the case here" because Kane himself — not an impostor — had submitted to the medical examination, and that the cause of death was unrelated to the reasons that the insurance companies argued made Kane "uninsurable," namely, prior death threats and a criminal conviction. *Id.* at 1169.

The Court of Appeals for the Eleventh Circuit affirmed, finding that "the district court correctly held that appellants are not entitled to an exception to Florida's incontestability statute." *Kane* 885 F.2d at 882. The Court of Appeals reasoned that the Florida courts were presented with "an ideal situation" in *Prudential Ins. Co. v. Rhodriquez*, 285 So. 2d 689 (Fla. 3d DCA 1973), "to create a fraud or impostor exception to the incontestability rule" and did not. *Id.* at 822. Notably, however, *Rhodriquez* was not an impostor case at all, but simply a "garden variety" fraud case where the insurer sought rescission based on the insured's "numerous misrepresentations as to his health and medical history," the truth behind which, if known, would have resulted in the rejection of the insured's application. *See Rhodrizuez*, 285 So. 2d at 689. The District Court of Appeals affirmed granting summary judgment in favor of the insured, holding that the incontestability clause barred the defense if brought more than two years after the policy had been in effect.

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Since *Kane* did not present an impostor case, and since the Eleventh Circuit Court of Appeals expressly followed *Rhodriquez* — which was not an impostor case — *Kane* cannot be fairly read to preclude our finding that the Florida courts would find an impostor exception.

Moreover, unlike here, the misrepresentations made by the insured in *Kane* were sanctioned by congressional mandate, were entirely "true" in the sense that the insured had been given a new "identity" by the Government, and thus — as the district court observed — could not possibly amount to fraud, which requires a false statement. *See Kane,* 689 F. Supp. at 1172. We also find that the justifications for permitting the impostor defense are far stronger where — unlike *Kane,* but like here — the cause of death was *directly* related to the false information supplied.

We also observe that the decision in *Home Life Ins. Co. v. Regueira,* 313 So.2d 438 (Fla. 2d DCA 1975), *cert. denied,* 320 So. 2d 844 (1976), not cited by the Court of Appeals for the Eleventh Circuit in *Kane,* suggests that the Florida courts may, in some limited circumstances, be willing to abrogate the incontestability rule. In *Home Life,* the Second District Court of Appeals permitted an insurance company to defend against a claim by the beneficiary of a group life insurance policy issued to the decedent's employer, even after the expiration of the two-year period, where the rescission was based on the ground that the insured was not an employee eligible for insurance under the terms of the policy. The Court of Appeals reasoned, following the decision of *Crawford v. Equitable Life Assurance Society,* 305 N.E.2d 144 (Ill. 1973), that this defense related to the limitations of coverage, and not to the validity of the policy, and that the former brand of defense was not barred by an incontestability clause.

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10. Although the case for an imposter exception may be weakest under Florida law, Florida is by far the least likely choice-of-law candidate between the three. Regardless of whether we apply the doctrine of lex loci contractus, *see generally Shapiro v. Associated Int'l Ins. Co.*, 899 F.2d 1116, 1119 (11th Cir. 1990) (suggesting that although the Florida Supreme Court has traditionally applied lex loci contractus, that Court would find the rule antiquated, and would likely take the Restatement approach); *Sturiano v. Brooks*, 523 So.2d 1126, 1129-30 (Fla. 1988) (applying lex loci contractus in the limited area of automobile insurance), or — as Plaintiff urges — "most significant contacts," *see* Restatement (Second) of Conflicts of Law § 192 (1971), Florida has only the most tenuous involvement with the instant contract.[2]

Under lex loci contractus, we analyze the place of contracting and the place of performance. There are virtually no contacts with Florida at the time of the contracting. The most that can be said is that Florida was listed on the application, in addition to New York, as the place of the insured's residence. Importantly, under Florida law, the place of contracting is the place of the last act necessary to complete the contract. *Jemco, Inc. v. United Parcel Service, Inc.*, 400 So.2d 499, 501 (Fla. 3d DCA 1981), *rev. denied*, 412 So.2d 466 (Fla. 1982); *Florida Towing Corp. v. Oliver J. Olson & Co.*, 426 F.2d 896, 900 (5th Cir. 1970). Although the first application stated that it was signed in Florida, the second application *upon which the contract was formed*, states that it was signed in New Jersey. Further, an express and final condition precedent to the contract was

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2. Under *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 61 S.Ct. 1020 (1941), a federal district court sitting in Florida must use Florida choice-of-law principles to determine the applicable law in an action grounded in state law.

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Anthony Fioretti's signing the Statement of Good Health, which recites its place of execution as New Jersey.[3]

Place-of-performance analysis is somewhat of an anomaly in a life insurance case, but in any event, Florida's contacts with the place-of-performance are similarly dilute: the insured lived in Florida during his terminal stages, the insured died in Florida, and the beneficiary lived in Florida.

Under the Restatement approach, Florida law is no closer to prevailing. The Restatement provides:

> The validity of a life insurance contract issued to the insured upon his application and the rights created thereby are determined, in the absence of an effective choice of law by the insured in his application, by the local law of the state where the insured was domiciled at the time the policy was applied for, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.

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3. Although Plaintiff disputes that the Statement was signed in New Jersey, pointing to the fact that the office of the broker — whose clerk, Susan Kaplon-Harmon, wrote "NJ" on the Statement — was in New York, given the strong presumption created by the document itself, the preponderance of the evidence does not support Plaintiff's contention. Either way, Plaintiff does not contend that the statement was signed in a state which we have found does not recognize an impostor exception.

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Restatement (Second) of Conflict of Laws § 192.[4] Although the question of domicile is disputed, the parties have stipulated that Anthony Fioretti owned an apartment in New York at the time of

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4. Section 6 of the Restatement (Second) of Conflict of Laws states:

> Choice-of-Law Principles
>
> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
>
> (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
>
> (a) the needs of the interstate and international systems,
>
> (b) the relevant policies of the forum,
>
> (c) the relevant policies of other interested states and the relative interest of those states in the determination of the particular issue,
>
> (d) the protection of justified expectations,
>
> (e) the basic policies underling the particular field of law,
>
> (f) certainty, predictability and uniformity of result,
>
> (g) ease in the determination and application of the law to be applied.

both applications and until 1988, and also owned a floral shop in New York. *See* Pretrial Stip. at ¶ 7, 8. It is clear New York State was Anthony Fioretti's domicile at the time of both applications. This factor weighs heavily in our decision that, even if Florida law were to bar proof of imposture, Florida law would not apply.

Following the language of the Restatement, "with respect to the particular issue" of the impostor defense, Plaintiff has not persuaded us that Florida has a more significant relationship to the issue than New York or New Jersey such that we should select the choice-of-law rules of the non-domicile state. Plaintiff argues that the policy form was approved only in Florida, and Mass General was licensed in Florida. Regardless of that fact, the policy was *issued* not in Florida, but rather, in New Jersey.

Next, Plaintiff urges that because Mass General is not licensed to do business in New York, and because the policy was not approved in New York, New York would have no interest in applying its laws to this contract. New York, however, certainly has an interest in preventing fraudulent conduct within its borders, especially where the fraud is carried out by one of its residents, perpetrated in manipulating unwitting third persons within the State, and through medical clinics and insurance brokers doing business in the State. *See Fleet Messenger Serv. Inc. v. Life Ins. Co. of North America*, 315 F.2d 593, 596-97 (2d Cir. 1963) (applying New York law where insured and beneficiary were New York residents, although insurer was not licensed there, policy was issued in Pennsylvania, application was executed in New Jersey, and first premium was tendered in New Jersey); N.Y. Ins. Law § 1213(b)(1) (McKinney 1993) (prescribing long-arm jurisdiction over insurance companies not licensed in New York that issue or deliver policies to New York residents, or solicit New York residents, or collect premiums from New York residents).

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Plaintiff further submits that New Jersey has no interest in the transaction since none of the participants in the contracting process were located in New Jersey. It is reasonable to conclude, however, that the parties intended New Jersey law to govern the contract since a concerted effort was made to designate New Jersey as the place of execution of the Statement of Good Health. As New Jersey was the location of the last act necessary to complete the contract — as evidenced by the designation of "NJ" on the Statement of Good Health and the lack of any evidence to contravene this inference — New Jersey would supply the rule of decision under the lex loci contractus approach. Because we have found that New York and New Jersey law would both likely uphold an impostor exception, it ultimately makes little difference whether the choice-of-law calculus points to New York or New Jersey as supplying the rule of decision.[5]

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5. At trial the question of whether the insurance contract at issue was part of an ERISA plan was vigorously litigated. The issue was mentioned only once prior to trial, in a footnote to Mass General's final brief on its motion for summary judgment, *see* Reply Summ. Jmt. Brief at 6 n.3, and appeared nowhere in the Pretrial Stipulation. Mass General argues that the life insurance policy was part of an ERISA plan, and thus federal common law — as enunciated by *Maslin* — should govern. Further, Mass General argues, a clause in the Pension Plan — which would be read together with the insurance policy if ERISA applies — expressly designates "the laws of the State in which the Employer maintains his principal place of business, to the extent not preempted by Federal law," as governing the construction of the Plan. *See* Ex. 43B at 15-2 (Pension Plan B). Plaintiff disagrees, contending that in actuality, the policy would not qualify to be an ERISA plan, since Anthony Fioretti was its only member entitled to benefits and ERISA does not apply to single-employee plans. We find it unnecessary to reach this issue since we have found that even accepting Plaintiff's position that ERISA does not apply here and state law is *not* pre-empted, the relevant state laws would recognize an impostor exception. If we did find that the policy was part of an ERISA plan and therefore federal common law would supply the rule-of-decision, we would read *Maslin* as governing the decision.

11. Because we have found that there are powerful reasons for permitting the insurer to raise the impostor defense, and that New York, New Jersey and Florida would all permit the litigation of the defense in their state courts, Mass General has properly presented a defense that an impostor appeared for Anthony Fioretti's medical examination. At trial, Plaintiff conceded the switch of blood samples. Contrary to Plaintiff's argument, we cannot find any functional distinction between a blood test for HIV and a medical examination, such that the impostor cases would be rendered irrelevant even if their rationale were accepted. Because of the particular factual matrix surrounding the insured's application in this case — namely, that the insured was flagged for possible HIV-infection — the blood test was the fulcrum of the application process. The reality of this case is that Mass General insured the person who gave the HIV-negative blood sample, that is, Mass General insured the impostor. As Mass General has successfully proven its defense of imposture, judgment must be rendered for Mass General and against the Plaintiff.

12. As an independent ground for our decision, Mass General has demonstrated that Anthony Fioretti made a series of fraudulent misrepresentations during the two-year period after the policy was issued, in order to conceal the substitution of his blood with that of an impostor. Specifically, he falsified the Statement of Good Health, *see* FF No. 8; he falsified the application for the waiver-of-premium benefit, *see* FF No. 11; and after Anthony Fioretti requested the waiver of premium and Mass General required another blood test, Fioretti again submitted the blood of an impostor, *see* FF No. 12. Thus, in the face of repeated and even extraordinary efforts by the insurer to root out any fraud before the expiration of the incontestability period, Anthony Fioretti answered the insurer's investigations

with additional acts of fraud designed to conceal the initial imposture. It would make little sense to permit his beneficiary to reap the benefits of the incontestability bar where, throughout the running of the two-year period, the insured repeatedly impeded the insurer's attempts to uncover the initial defects in the application. *See generally, Bornholdt v. Brady,* 869 F.2d 57, 67 (2d Cir. 1989) (discussing the doctrine of equitable tolling); *Bowers v. Transportacion Maritima Mexicana, S.A.,* 901 F.2d 258, 264 (2d Cir. 1990) (same).

Accordingly, it is hereby

ORDERED AND ADJUDGED that final judgment is entered for Mass General and against Vincent Fioretti on all counts of the amended complaint, and that judgment is entered for Mass General and against Vincent Fioretti on the counterclaim.

Mass General shall submit a proposed order of final judgment within ten (10) days of the date of this order.

DONE AND ORDERED in Miami, this 24th day of September, 1993.

s/ Stanley Marcus
STANLEY MARCUS
UNITED STATES DISTRICT JUDGE

copies to:
counsel of record